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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers	)	CCB/CPD File No. 98-63

COMMENTS OF ALLEGIANCE TELECOM, INC.

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Dated: October 29, 1999

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SUMMARY

The *NPRM* issued in this proceeding correctly identifies a major problem - some IXCs are not paying CLEC tariffed interstate access charges. IXCs refusal to pay seriously disrupts the interexchange access market, hinders CLECs' ability to participate in local telecommunications markets, and undermines the pro-competitive goals of the Act. The Commission should act promptly to require IXCs to pay CLEC tariffed interstate access charges.

If the Commission determines that IXCs may refuse to purchase CLEC interstate access services to any extent, the Commission should counterbalance this determination by establishing a "fresh look" opportunity for IXCs' customers to migrate to other IXCs and by permitting and enabling CLECs to provide notification to the IXC's customers, including customers of toll free 8XX services, that the IXC may not complete calls.

IXCs have not shown that CLECs' interstate access charges are unreasonable. Anecdotal information submitted by IXCs is either incorrect or seriously exaggerated. Nor do CLECs possess market power in provision of interstate access services.

If the Commission chooses to establish a benchmark approach to evaluate CLEC interstate access charges, the Commission should set the benchmark well above any ILEC rate in

whose territory the CLEC is operating because CLECs, as start up companies, have higher costs per customer than do ILECs for a number of reasons.

The Commission should require that IXCs file with the Commission all off-tariff access arrangements they have entered into with CLECs in order to limit IXC's undue bargaining power in negotiating with CLECs.

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COMMENTS OF ALLEGIANCE TELECOM, INC.

Allegiance Telecom, Inc. ("Allegiance") respectfully submits these comments in response to the August 27, 1999 *NPRM* issued in the above-captioned proceedings.[1] Allegiance is a facilities-based competitive local exchange, interexchange, and international carrier that is rapidly expanding its provision of various competitive telephone services, Internet access, operator services, and high speed data services to areas throughout the country. Allegiance affiliates are currently providing service in eighteen markets in the United States. Allegiance

[1] *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262,FCC 99-206, released August 27, 1999 ("*NPRM*" or "*Pricing Flexibility Order*").

Telecom International, Inc. provides international facilities-based and resale services between the United States and other countries.

I. IXCS MAY NOT DECLINE SERVICE

The *NPRM* correctly identifies a major problem - some IXCs are refusing to pay CLEC tariffed access charges. At the same time, those IXCs have not taken the hard step of terminating service to their customers. They are continuing to enjoy the revenues earned from providing long distance service to their customers but are not paying for the access services that they receive from CLECs. This is extremely disruptive to CLECs' ability to compete and provide service. The Commission should act promptly in this proceeding to eliminate this major market dislocation.

Allegiance supports the availability of remedies to IXCs for unreasonable interstate access charges. However, that remedy should not be the ability to obtain access service for free, nor should it be to refuse interconnection. Instead, the Commission should make clear that IXCs may avail themselves of the remedy that was intended for the purpose of addressing unreasonable rates - the Section 208 complaint process. This provides IXCs a complete remedy (including refunds) against unreasonable CLEC access charges.[2] The Commission should also confirm that

[2] CLECs, as non-dominant carriers, file interstate access tariffs on one day's notice. These tariffs are not "deemed lawful" under Section 204(a)(2)(C) of the Act. *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Report and Order, CC Docket No. 96-187, 12 FCC Rcd 2170, released January 31, 1997.

IXCs must follow the established rule of paying tariffed charges pending any dispute.[3] This would provide a better mechanism to determine reasonable CLEC rates than regulation of the industry as a whole.

The *NPRM* asks whether there are any statutory or regulatory constraints that prevent an IXC from declining a CLEC's access service.[4] This involves two questions: (1) whether IXCs may refuse to pay for access services that they receive when a LEC originates or terminates a long distance call, and (2) whether IXCs may refuse to accept as long distance customers, or complete their customers' calls to, end users served by LECs whose access charges they believe are unreasonable. These questions are applicable to all IXC interexchange services for which they purchase switched access, including toll free 8XX services. Allegiance submits that IXCs must pay for the access services they receive and may not refuse to serve customers, or complete calls to customers, as the remedy for interstate access charges they object to.

A. IXCs Must Pay for Access Services They Receive

In *MGC Communications* the Common Carrier Bureau determined that AT&T was required to pay MGC's tariffed interstate access services because AT&T had failed to actually terminate receipt of MGC's interstate access services.[5] Instead, AT&T had done little more

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3 *MCI Telecommunications Corp.*, 62 FCC Rcd 703, 705-706; *Business WATS, Inc. v. AT&T*, 7 FCC Rcd 7942 (1992); *Communique Telecommunications, Inc. d/b/a LOGICALL*, 10 FCC Rcd 10399 (1995).

4 *NPRM*, para. 242.

5 *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 (1999) ("*MGC Communications*").

than state it did not want to receive MGC's interstate access services and refused to pay for them even though it continued to receive those services and even took on new customers. Accordingly, *MGC Communications* stands for the proposition that if an IXC receives an interstate access service, it must pay for it. Absent this requirement, IXCs could indefinitely receive access services from CLECs and not pay for them while continuing to charge their customers for long distance service, contrary to *MGC Communications*. Therefore, IXCs may not refuse access services in the sense of receiving, but not paying for, them.

The Commission should take the opportunity presented by this proceeding to determine that IXCs must pay back charges including interest for CLEC access charges that they have declined to pay. As discussed, under applicable precedent, customers of a tariffed service are required to pay tariffed charges until they obtain a ruling in Section 208 complaint proceeding that the tariffed charges are unlawful. This determination would bring IXCs into compliance with regulatory requirements and help establish an orderly administration of interstate access charges by the industry.

B. IXCs May Not Decline to Serve Customers, or Complete Calls, Because Access Charges Are Assertedly Unreasonable

The statutory scheme established in the Act provides that IXCs may not refuse to provide service or complete calls on the ground that interstate access charges are too high. Instead, the appropriate remedy is to file a complaint under Section 208 for any interstate access charges they believe are too high.

The rate integration requirements of Section 254(g) of the Act provide that an IXC may not charge subscribers in a state rates that are higher than the IXC charges in any other state.[6] In effect, this Section requires IXCs to offer averaged interstate interexchange rates to end users. IXCs must average varying interstate access charges and offer averaged long distance rates to all end users. The Commission determined in implementing Section 254(g) that it could not permit IXCs to depart from averaged interstate rates absent forbearance under Section 10 of the Act.[7] The Commission also stated that widespread deaveraging of interexchange services could produce unreasonably high rates for some subscribers.[8] Allegiance submits that Congress intended that IXCs absorb varying interstate access charges, not simply refuse to provide service. Accordingly, the Commission should determine that Section 254(g) prohibits IXCs from declining to accept a long distance customer, or completing a call, because it believes that a LEC's interstate access charges are unreasonable.

Section 251(a) of the Act establishes that every telecommunications carrier has the duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[9] In establishing this duty, Congress must have meant more than

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[6] 47 U.S.C. Section 254(g).

[7] *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Report and Order*, CC Docket No. 96-61, 11 FCC Rcd 9564, paras. 38, 52 (1996) ("*Rate Integration Order*").

[8] *Rate Integration Order*, para. 39.

[9] 47 U.S.C. Section 251(a).

simply interconnecting and claiming an exemption from the normal framework governing compensation to LECs for provision of interstate access services. Implicit in the duty to interconnect is the concept that interconnecting carriers must pay any normally applicable charges such as interstate access charges. Absent this obligation, the Act would be unconstitutional, since carriers cannot be compelled to interconnect without being compensated for the interconnection services they provide.

Instead, Congress established the complaint process as the remedy for addressing any unreasonable interstate access charges. The amendments to Section 208 contained in the 1996 Act require the Commission to complete complaints concerning tariffed rates within 5 months.[10] In addition, the Commission has established procedures for even more expedited resolution of Section 208 complaints.[11] Therefore, the complaint process provides a mechanism for rapidly addressing IXC concerns about CLEC interstate access charges.

In addition, under the "filed rate doctrine," which essentially expresses the tariffing requirements of Section 203 of the Act, a rate is lawful and must be charged and collected if it appears in an effective tariff.[12] Accordingly, there is no rate that a CLEC may charge, or that an

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[10] See 47 U.S.C. Section 208(b)(1).

[11] *See* 47 C.F.R. Section 1.730.

[12] The "filed rate doctrine" prohibits a regulated entity from charging rates "for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall,* 453 US 571, 577(1981). As the Supreme Court has noted, the doctrine creates "strict filed rates requirements and... forbid[s] equitable defenses to collection of the filed tariff." *Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 US 116, 127 (1990). Simply put, a tariff filed with the FCC supersedes all other agreements between the parties. *MCI*

IXC may pay, other than the CLEC's effective tariffed rate. Therefore, IXCs must pay a CLEC's tariffed interstate access charges.

In short, Congress created a complete statutory scheme envisioning universal interconnection, averaged interstate long distance rates, and an accelerated complaint process for the purpose of addressing any dispute between carriers over rates, terms, and conditions, for interstate services. It would tear apart this statutory fabric if IXCs could refuse to interconnect and provide service to end user customers on the ground that interstate access charges are too high. The Commission should issue a declaratory ruling in this proceeding to that effect. To the extent there is any doubt that this statutory scheme does not already prohibit IXCs from refusing to pay for interstate access services they receive without additional rules, the Commission should use its rulemaking authority under the Act and these statutory provisions to establish rules in this proceeding prohibiting IXCs from refusing to provide service to end users on the grounds that interstate access charges are too high.

C. Allowing IXCs to Refuse Service and Block Calls Would Disserve the Public Interest

An outstanding feature of the telephone network in the United Stated is universal interconnectivity between carriers and the expectation that the call will go through. The Commission should not undermine this universal connectivity by permitting IXCs to refuse

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Telecom Corp. v. Best Tel. Co., 898 F. Supp. 868, 872 (D.S.D. Fla. 1994). Indeed, "filed tariffs are the law, not mere contracts." *MCI Telecommunications Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992). Nondiscriminatory rate setting is one of the basic rationales for the doctrine. *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 21 (2d Cir. 1994).

access service. If IXCs could choose to refuse to purchase access service from some LECs, callers would never know if a call was going to go through. This would inevitably lead to heightened consumer frustration and confusion.

In addition, there is a significant risk to the public health and safety in permitting IXCs to refuse access service. While emergency services are predominantly local, there are instances where an interexchange call is necessary to appropriately handle emergency calls. What would be the consequences if police departments in Los Angeles and Washington, DC are unable to coordinate a matter because the IXC has decided not to put any long distance calls through to a CLEC that provides local service to one of the police departments because the CLEC's interstate access charges are assertedly too high? What would be the consequences if a hospital needs to contact an individual in another state but cannot because no IXC will purchase access service from the CLEC serving the customer? It is not hard to imagine scenarios in which the abandonment of universal connectivity could have a strong adverse impact on the public health and safety.

Moreover, there would be no rational way to distinguish between ILECs and CLECs as far as an IXC's ability to refuse service. If IXCs are permitted to refuse service as the remedy for what they perceive as high interstate access charges, why couldn't they decline service from an ILEC on that ground? IXCs could refuse to provide service in high cost areas. Permitting IXCs to refuse access service would effectively balkanize, and threaten the functional integrity of, the nationwide telephone network.

The *NPRM* appears to recognize the significant drawbacks that would be involved in allowing IXCs to decline to purchase access.[13] The *NPRM* asks about the consequences to consumers, universal service goals, and rural areas of this approach.[14] It might be possible to ameliorate some adverse consequences by, for example, requiring the IXC to provide advance notice to customers that it would no longer provide service to them because the IXC believes that the LEC's interstate access charges are too high. However, advance notice would do nothing to remedy a customer's inability to receive incoming calls. Even for outbound service, given the increasing concentration of the long-distance market, it is far from certain that customers could readily obtain alternative service if they received such a notice. Allegiance submits that any significant inability of consumers to make or complete long distance calls, if it takes place, could not be ameliorated by advance notice to customers.

Instead, the Commission should take steps in this proceeding to promote and enhance universal connectivity. The Commission should act to eliminate the threat to universal connectivity posed by IXCs' declining to purchase access. The Commission should make clear that IXCs may not decline to purchase access from a LEC - whether ILEC or CLEC - when the calling party, or in the case of toll free 8XX services, the called party, has selected the IXC to carry the call and such access is the most direct way to originate or terminate the call. This is the best approach to maintaining universal connectivity and the integrity of the public switched

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13 *NPRM*, para. 242-243.

14 *Id.*

telephone network. This will minimize customer confusion and unhappiness caused by uncertainty about the ability to complete calls. It will also avoid the potentially serious harms caused by inability to complete calls.

The Commission clearly has authority to require universal connectivity. As noted, section 251(a) requires all telecommunications carriers to interconnect directly, or indirectly, with other carriers. The Commission has authority under this section to establish that IXCs may not decline access services. In addition, Section 201(a) of the Act provides that it is the duty of every common carrier to, *inter alia*, "establish physical interconnection with other carriers" in accordance with the orders of the Commission after opportunity for hearing.[15] Obviously, this section gives the Commission authority to require IXCs to use and pay for CLEC interstate access services.

II. IF IXCs ARE PERMITTED TO REFUSE ACCESS, SPECIAL COUNTERBALANCING MEASURES SHOULD BE ADOPTED

For the reason discussed above, it would not serve the public interest, nor would it be lawful, to permit IXCs to decline to purchase access from CLECs. If for any reason, the Commission permits IXCs to do so, the Commission should adopt measures that would reduce the harm this would otherwise cause.

<u>"Fresh Look" Opportunities</u>. If the Commission permits IXCs to decline access, the Commission should establish a fresh look opportunity for the customers of the IXC declining access in the area served by the CLEC. Customers must be released from term, volume, and

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15 47 U.S.C. Section 201(a).

other commitments so that they may migrate to IXCs that are willing to pay the CLEC's access charges. This should be a broad and permanent fresh look opportunity that continues for as long as the IXC declines to purchase access from the CLEC. This is an equitable approach: if the IXC believes that a CLEC's interstate access charges are too high, it should permit its customers to be served (without penalty) by IXCs who do not find these charges unreasonable.

Notification to Customers. If an IXC may refuse access service, CLECs should be given authority, to the extent any is necessary, to notify the public that the IXC will not complete calls in some cases. This should specifically include 8XX customers of IXC toll free services who should be educated to understand that calls to them may not always be completed. This will enable consumers to make an informed choice as to which IXC they want to serve them. It will also assure that CLECs are not blamed when an IXC refuses to complete a call.

III. AN APPROPRIATE BENCHMARK COULD PLAY A ROLE IN GOVERNING CLEC ACCESS CHARGES

A. The Commission Must Avoid Burdensome Benchmark Regulation

As a general matter, the Commission should be wary of adopting a benchmark approach to regulation of CLEC interstate access charges. The Commission's most extensive experience with benchmark regulation was regulation of rates for cable service under the 1992 Cable Act.[16] That experience shows that what was initially intended as a simple way of regulation turned about to be extremely complicated and burdensome.

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[16] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 - Rate Regulation*, MM Docket No. 92-266, 8 FCC Rcd 5631 (1993).

In order to avoid burdensome benchmark regulation, the Commission should not establish a benchmark that establishes a maximum lawful rate, such that any rates above the benchmark would be conclusively unlawful. Instead, at most, the benchmark should establish a strong presumption of lawfulness that a complainant in a Section 208 proceeding must overcome by proof that the rate is unreasonable. In order to give the benchmark some genuine and useful regulatory meaning, the Commission should establish that the presumption of lawfulness of below-benchmark rates is stronger than the presumption of *prima facie* lawfulness that all non-dominant carrier tariffs are already accorded under the Commission rules.[17] The Commission should also assure that the benchmark does not as a legal or practical matter prescribe a rate structure for CLECs. CLECs are not now subject to any of the Commission's rules prescribing rate structures for ILEC interstate access charges and it would be unduly burdensome on CLECs if, in order to assure that rates are under any benchmark, they must conform to ILEC rate structures.

B. ILEC Rates Should Not Determine CLEC Rates

In no event should the Commission determine that the benchmark rate for a CLEC is the rate of the ILEC with whom it is competing. As explained below, there are a number of reasons why any benchmark rate for CLECs should be set well above ILEC rates. At most, ILEC rates should serve only to establish the lower end of any range of rates or zone of reasonableness within which the Commission might pick a CLEC benchmark rate. The Commission should use

[17] See 47 C.F.R. Section 1.773(a)(ii).

ILEC rates as the starting point in its analysis and then adjust upward based on factors described below to set any benchmark rate for CLECs.

Section 201(b) of the Act requires that rates for interstate communications be just and reasonable. But, that section does not require that new entrants' rates must match those of incumbents in order to be reasonable. Even assuming, *arguendo,* that CLECs possess market power in provision of terminating access, that would not mean that the only reasonable rate for a CLEC is a rate no higher than the rate of the ILEC. In addition, a benchmark that is above ILEC rates is necessary to assure that benchmark regulation is not burdensome to CLECs. Accordingly, as discussed below, the Commission should establish any CLEC benchmark rate at levels substantially above ILEC rates.

Start-Up Companies Have Fewer Customers. Start-up companies have fewer customers over which to spread costs in contrast to ILECs who continue to possess the overwhelming share of local service customers. While ILECs also have greater costs, start-up companies have proportionately higher costs per customer and per line. In addition, CLECs incur higher unit costs than ILECs because, for example, they cannot obtain the same equipment, facility, and support discounts through high volume purchases that ILECs can. ILECs are frequently able to obtain special, lower priced purchase arrangements because of their large buying power. It is therefore reasonable for CLECs to charge higher rates per customer or per line than do ILECs. As the Commission observed in the *NPRM*, "[w]e acknowledge that CLEC access rate may, in fact, be higher due to the CLECs' high start-up costs for building new networks, their small geographic service areas, and the limited number of subscribers over which CLECs can distribute costs."[18]

The situation faced by CLECs is similar to that of firms introducing new products or services where initially the price of the product or service is high but then declines as output increases. Thus, it was not unreasonable, for example, for satellite television services to initially charge $700 for home receiving equipment even though prices have now fallen to below $200. In the same way, CLECs with relatively few customers may need from a practical and business perspective to charge customers more for some services initially than the ILEC charges.

What the Commission should understand is that the decision of how much of start up costs should be recovered initially, or deferred, is a key discretionary business decision. Rates are not unreasonable under the Act merely because a start-up company charges somewhat higher rates to relatively fewer customers.

Allegiance submits that if the Commission sought to regulate in this area, there are essentially no operable standards that could be employed for determining how much a start up company could charge initial customers. In no event should the Commission impose ILEC rate making standards on CLECs for determining what costs may be recovered initially, if there are any such standards. This would impose burdensome public utility accounting standards on CLECs with which they do not currently comply because they have no need to. Nor are they capable of complying with such requirements as the Uniform System of Accounts without very

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18 *NPRM*, para. 244.

burdensome administrative and expensive internal management system changes. Accordingly, the Commission should determine that any benchmark should be higher than ILEC rates because it is reasonable for CLECs as start up companies to charge more than ILECs.

ILEC Switched Access Rates are Averages Across Study Areas. Under the Commission's rules, ILECs are required to charge switched access rates that are averaged throughout a state. CLECs rarely serve exactly the same geographic area as any given ILEC, making the ILEC rates unsuitable for use as a benchmark for CLEC rates. Further, ILEC average rates are not likely to match its costs of providing service in any area, making ILEC rates even less appropriate to use as a benchmark. And while CLECs operating in urban markets may have cost characteristics more comparable to those of ILECs operating in rural areas in a number of respects, including those that result from smaller number of customers served, smaller service areas, lack of economies of scale, and reduced density of customers within the carrier's service area, the averaged ILEC rates in urban areas are still not suitable for use as a benchmark for CLECs operating in those areas. In fact, an ILEC's rate in an urban area is likely to be below startup CLECs costs in that area, even if the ILEC's rates are above the ILEC's costs of providing service there.

Accordingly, the Commission should conclude that any benchmark cannot be the same as the rate of the ILEC with whom the CLEC is competing. Instead, in order to assure that any benchmark will not be unreasonable for the CLEC, the Commission should set any benchmark well above the ILEC rate.

Promoting Investment in Competitive Infrastructure. The Commission should additionally not set any benchmark at the rate of the competing ILEC because this could discourage infrastructure investment and facilities-based competition. Rates for incumbent LECs are set based on the assumption that they will be able to fully recover costs over a number of years. This produces lower rates. Holding CLECs to the same standard would discourage investment by CLECs and hinder the development of facilities-based competition. In order to promote the pro-competitive goals of the Act, the Commission should set any benchmark well above ILEC rates.

Risk Premium Analysis. A risk premium analysis is one of the established methods used by regulators to determine the cost of equity in setting rates-of-return.[19] While the Commission should not attempt to conduct a rigorous risk premium analysis in this proceeding, the Commission should in setting any benchmark rate recognize that CLECs, as new market entrants, face significantly greater risks than ILECs. Because of this higher risk, investors and lenders expect significantly higher ultimate returns than is the case with respect to ILECs. Accordingly, it is reasonable for CLECs to charge somewhat higher rates than ILECs.

If the Commission adopts a benchmark approach, it should for the above reasons adopt a benchmark that permits CLECs to charge, and requires IXCs to pay, rates that are higher than the ILEC rate in whose area the CLEC competes. Imposing as the benchmark for a CLEC the

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[19] *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Rate Regulation*, Notice of Proposed Rulemaking, MM Docket No. 93-215, 74 Rad. Reg. 2d (P&F) 1247 (1993), para. 51.

rate of the ILEC would seriously harm the CLEC's ability to compete. Allegiance suggests that the Commission therefore consider choosing as a benchmark a rate that is among the high end of ILEC rates such as NECA rates.

If the Commission takes these and possibly other steps that will develop in the course of this proceeding to assure that benchmark regulation is not onerous, it is possible that a benchmark could play a useful role. In this regard, it will be absolutely essential that the Commission make clear, as discussed, that IXCS must accept and pay for interstate access services and that the appropriate remedy for assertedly unreasonable LEC interstate access charges is to file a complaint. Absent this requirement, the one-sided imposition of a benchmark will serve no useful purpose since IXCs will simply refuse to pay for interstate access services whose rates they object to whether those rates are above or below the benchmark.

IV. RATE INTEGRATION PROHIBITS IXCS FROM CHARGING DIFFERENT RATES TO SUBSCRIBERS WITHIN A GEOGRAPHIC AREA BASED ON ACCESS CHARGES IMPOSED BY THE END USER'S LEC

In the *NPRM*, the Commission asks whether Section 254(g) would permit IXCs to charge different rates to end users within a geographic area based upon the level of access charges levied by the end user's local exchange company.[20] The Commission stated that Section 254(g) is intended to ensure that rates between geographic areas are equal, not necessarily rates within a specific geographic area, citing a portion of that Section's legislative history.[21]

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[20] *NPRM*, para. 245.

[21] *Id.* citing Joint Explanatory Statement, S. Rep. No. 230, 104th Cong., 2nd Sess. at 132 (1996): "[n]ew section 254(g) is intended to incorporate the policies of geographic rate

It would violate geographic rate averaging requirements for an IXC to charge different rates to subscribers within a specific area, such as an MSA, on the basis of different access charges imposed by the LECs serving the end user, or for any other reason. Geographic rate averaging requires that subscribers in rural and urban areas receive the same rates. If different subscribers in an urban area receive different rates, then it will necessarily be the case that rural and urban subscribers are not receiving the same rates because some urban subscribers will be receiving rates that are different from those received by rural subscribers. In short, for all practical purposes, it will not be possible for IXCs to comply with geographic averaging requirements unless they offer all subscribers in a state the same rates.

Of course, it is more likely, if permitted to do so, that IXCs would seek to charge higher rates to subscribers in rural areas because access rates are likely to be higher in rural areas where costs are higher. This would lead precisely to what the Commission was concerned about in the *Rate Integration Order* when it denied IXCs' requests for various exceptions to geographic rate averaging requirements. There, the Commission determined that creating a broad exception to geographic rate averaging requirements "entails a substantial risk that many subscribers in rural and high cost areas may be charged more than subscribers in other areas."[22] Accordingly, apart from the fact that it would violate Section 254(g) to permit IXCs to charge different rates in an

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averaging and rate integration of interexchange services in order to ensure that subscribers in rural and high cost areas throughout the Nation are able to continue to receive both intrastate and interstate interexchange services at rates no higher than those paid by urban subscribers."

[22] *Rate Integration Order*, para. 39.

area, it would also be bad policy and threaten the ability of subscribers in rural and high cost areas to receive affordable, averaged long distance rates. This is exactly contrary to what Congress intended. Therefore, the Commission should not permit IXCs to charge different rates in an area based on differing access charges of LECs serving end users in the area.

V. MANDATORY DETARIFFING IS NOT A SOLUTION

The *NPRM* asks whether mandatory detariffing might address any market failure to constrain CLEC terminating access rates.[23] The *NPRM* observes that some IXCs have contended that they have been unable to negotiate interstate access charges with CLECs because CLECs claim that the filed rate doctrine prevents them from negotiating rates.

At this point, it is unclear if the Commission has authority to implement mandatory detariffing.[24] In addition, it is simply erroneous that tariffing precludes negotiations. Special negotiated arrangements can be included in contract tariffs. IXCs are able to obtain contract tariffs with CLECs notwithstanding the filed rate doctrine.

Mandatory detariffing would additionally create a large imbalance in negotiating power in favor of IXCs. IXCs could use their enormous purchasing power with respect to special access services effectively to compel CLECs to provide switched access at non-compensatory rates. The filed rate doctrine provides some protection to CLECs from unreasonable demands by

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23 *NPRM*, para. 246.

24 *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730, 20741-43 (1996)("*Tariff Forbearance Order*"), stay granted, *MCI Telecommunications Corp. v. FCC*, No. 96-1459 (D.C. Cir. filed Feb. 13, 1997).

IXCs. Accordingly, the Commission should not establish mandatory detariffing. Instead, the current policy of permissive detariffing should be maintained.[25]

VI. THERE IS NO EVIDENCE OF WIDESPREAD UNREASONABLE CLEC INTERSTATE ACCESS CHARGES

The *NPRM* does not present a sufficient basis to warrant a conclusion that CLECs are charging unreasonable interstate access charges. As evidence of unreasonable CLEC interstate access charges, the *NPRM* relies exclusively on statements by IXCs that some CLECs may be charging unreasonable rates. Most of the CLEC rates cited by AT&T are incorrect.[26] Even if the rates cited by AT&T were correct, which they are not, there are more than 200 facilities-based and resale CLECs operating in the United States.[27] Hence, AT&T's allegations are clearly false, or at most grossly exaggerated. Allegiance submits that, even if it is the case that some CLECs are charging very high interstate access charges, this is not a sufficient basis to adopt the extensive regulatory schemes contemplated in the *NPRM*. As discussed in these comments, these proposals would variously involve network dislocations, abandonment of universal connectivity, discourage investment by competitive providers, and impose onerous rate regulation.

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[25] *Hyperion Telecommunications, Inc.*, Memorandum, Opinion, and Order, 12 FCC Rcd 8596 (1997).

[26] ALTS pointed out, for example, that one of the alleged overcharging companies was in fact an ILEC, and that other companies cited by AT&T were not charging the rates cited by AT&T. ALTS Comments, CCB/CPD File No. 98-63, filed December 7, 1999.

[27] *NPRM* para 238, n. 579. There are over 200 facilities-based and resale CLECs in the United States. Common Carrier Bureau, Industry Analysis Division, *Local Competition* (rel. Dec. 1998) at tbl. 4.1 (146 CLECs own at least some facilities, as of the third quarter of 1998).

If the Commission makes clear that IXCs must pay tariffed CLEC interstate access charges, IXCs can, and will, use the Section 208 complaint process to address any concerns about individual CLEC interstate access charges. This would provide a much better balancing of the costs and benefits of the various options available to the Commission than would adoption of new regulatory programs governing CLEC interstate access charges.

VII. CLECS DO NOT POSSESS MARKET POWER IN PROVISION OF TERMINATING ACCESS

The *NPRM* asks whether CLECs possess market power in provision of terminating access.[28] As noted, the evidence supporting regulation of CLEC interstate access charges is little more than anecdotal information submitted by AT&T, some of which is incorrect.[29] This showing falls far short of what would be necessary for the Commission to make a finding that CLECs possess market power in the provision of terminating interstate access.

The Commission correctly determined in the *Access Reform Order* that CLECs do not possess market power in provision of terminating access.[30] There, the Commission found that ILEC rates would constrain CLEC rates, and that CLECs, especially those providing competitive access services, have incentives to charge reasonable rates in order to maintain or expand their

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[28] *NPRM* para. 239.

[29] *See* n. 26, *supra*.

[30] *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, Report and Order, CC Docket Nos 96-262, 94-1, 91-213, and 95-72, 12 FCC Rcd 15982 (1997) ("*Access Reform Order*").

access transport, special access, or other competitive services with IXCs.[31] The Commission also pointed out that if a CLEC consistently overcharged an IXC for terminating access, the IXC would have an incentive to enter a marketing alliance with another CLEC in the same market. The Commission pointed out that the end-user customer may respond to incentives from the IXC to switch to another CLEC or the ILEC offering service in the same area.[32]

These observations remain correct today. IXC's are able to exert downward pressure on CLEC interstate access charges by encouraging end user customers to obtain local service from another carrier. Both large customers and residential customers are likely to respond to inducements from IXCs to switch local service providers, particularly in the case of large customers with whom the IXC may have contract arrangements. To the extent that IXCs have not sought to exploit this approach to reducing CLEC terminating access charges, this reflects only that IXCs have preferred to avail themselves of the easier (and unlawful) alternative of simply not paying CLEC tariffed interstate access charges. The Commission should make clear in this proceeding that IXCs must may CLEC tariffed interstate access charges. This will compel IXCs to exploit the market based approaches available to them to address any unreasonable CLEC terminating access charges.

Moreover, the implementation of number portability may have substantially invalidated a key underpinning of the Commission's concern about CLEC terminating access charges.

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[31] *Id.* para. 361.

[32] *Id.* para. 362.

"Although an IXC must use the competitive LEC serving an end user to terminate a call,"[33] with the advent of number portability the IXC can route terminating calls to the ILEC operating in the same area as the CLEC who will then route the call to the CLEC. The ILEC will ascertain whether the terminating number is served by the ILEC, or another local carrier and route the call accordingly. The final portion of the call would be handled by the CLEC serving the end user customer. The compensation between the ILEC and the CLEC for handling such a call would be governed by the interconnection agreement between the ILEC and the CLEC. Typically, the interconnection agreement will provide for "meet point billing" for the joint handling of an interstate interexchange call under which the ILEC and the CLEC will separately recover from the IXC for the provision of interstate access services that each provides. The ILEC may impose additional charges on the IXC for handling the call such as number portability query charges, which major ILECs have federally tariffed, if applicable. Thus, IXCs have alternatives by which they can partially avoid CLEC interstate access charges. This provides a substantial way for IXCs to exert downward pressure on CLEC terminating access charges.

Nor does CLECs' provision of terminating access meet the criteria that the Commission has used to support a finding of market power. In the *AT&T Non-Dominance Order,* the Commission focused on market share, supply elasticity, demand elasticity, and AT&T's size and resources.[34] Under these criteria, CLECs lack market power in provision of terminating access.

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33 *Access Reform Order*, para. 360.

34 *AT&T Non-Dominance Order*, para. 38.

CLECs have a tiny percentage of the terminating access market. Moreover, in the recent *Pricing Flexibility Order* the Commission for all practical purposes found that there were significant elasticities of supply and demand for access services when it found that Phase I pricing flexibility triggers based on collocation have probably been met for a number of, and probably most, major markets. Finally, CLECs' size and resources are tiny in comparison to ILECs' in provision of exchange access services including terminating access. Accordingly, under the analysis applied in the *AT&T Non-Dominance Order*, CLECs lack market power in provision of terminating access.

In any event, even if CLECs possess some market power for some services, the Commission should conclude that the costs of regulation would outweigh any benefits. In the *AT&T Non-Dominant Classification Order*, the Commission set forth the standards for assessing market power.[35] The Commission determined that before assessing market power, the Commission must first determine the relevant product and geographic market and how to assess whether a carrier possesses market power within that market.[36] The Commission determined that the appropriate way to assess AT&T's market power was whether it possessed market power in the overall interstate, interexchange market.[37] The Commission rejected an "all services"

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[35] *In the Matter of Motion of AT&T Corp. To Be Reclassified as a Non-Dominant Carrier*, Memorandum Opinion and Order, 11 FCC Rcd 3271 (1995) ("*AT&T Non-Dominant Classification Order*").

[36] *AT&T Non-Dominant Classification Order*, para. 19.

[37] *Id.* para. 26.

standard under which AT&T would have been required to establish that it lacks the ability to control price in all service segments. The Commission found that evaluating market power on an "all services" approach "would result in a situation where the economic cost of regulation outweighs its public benefits."[38] The Commission also found that in a case where a carrier has only limited market power in a market that "the costs resulting from the imposition of regulation may be significantly greater than the benefits for consumers, if any, from that regulation."[39]

The Commission should make the same assessment here. The Commission should reaffirm that in the overall market in which CLECs provide service - the local exchange and exchange access market - CLECs are non-dominant and that the costs of regulation would exceed any benefits. The Commission should determine, assuming *arguendo* CLECs possess some market power in the provision of terminating access, that the costs of regulation would exceed any benefits.

VIII. THE COMMISSION SHOULD REQUIRE DISCLOSURE OF OFF-TARIFF ACCESS AGREEMENTS

Allegiance is very concerned that a number of IXCs are entering into special access arrangements with CLECs that are not reflected in CLEC or IXC filed tariffs. These agreements permit IXCs to discriminate against CLECs and seek to compel CLECs to enter into access arrangements on the ground that other CLECs are providing certain arrangements. The Commission should require IXCs to file all interstate access arrangements they have entered into

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38 *Id.*

39 *Id.* para. 29.

that are not reflected in CLEC tariffs in order to better balance bargaining power between CLECs and IXCs.

IX. CONCLUSION

The Commission should act promptly to end dislocations in the interstate access market caused by IXCs' unlawful refusals to pay CLEC tariffed charges. The Commission should determine that an IXC must pay for any interstate access services it receives from a CLEC, including any back charges with interest, pending resolution of any Section 208 complaint that the IXC may choose to file concerning a CLEC's tariffed rates. The Commission should determine that IXCs may not refuse to provide service to customers on the ground that a CLEC's interstate access charges are unreasonable. If the Commission determines that IXCs may refuse to purchase CLEC interstate access services, the Commission should counterbalance this determination by establishing a "fresh look" opportunity for IXCs' customers to migrate to other IXCs and by permitting and enabling CLECs to provide notification to the IXC's customers, including customers of toll free 8XX services, that the IXC may not complete calls.

CLECs do not possess market power in provision of interstate access services. Nor have IXCs shown that CLECs' interstate access charges are unreasonable. If the Commission chooses to establish a benchmark approach to evaluate CLEC interstate access charges, the

Commission should set the benchmark well above any ILEC rate in whose territory the CLEC is operating because CLECs, as start up companies, have higher costs per customer than do ILECs for a number of reasons. The Commission should require that IXCs file with the Commission all off-tariff access arrangements they have entered into with CLECs in order to limit IXCs' undue bargaining power in negotiating with CLECs.

Respectfully submitted,

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Dated: October 29, 1999

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Comments of Allegiance Telecom, Inc. have been served by hand delivery to the persons on the attached list.

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